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IN THE

Supreme Court of the United States

October Term, 1980

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,
Petitioners,

v.

TERRI LEE HALDERMAN, et al.,
UNITED STATES OF AMERICA, and
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENTS AND CROSS-PETITIONERS PARC, et al.

THOMAS K. GILHOOL*
FRANK J. LASKI
BEVERLY J. LUCAS
MICHAEL CHURCHILL
Public Interest Law Center of Philadelphia,
1315 Walnut Street, Suite 1600,
Philadelphia, Pennsylvania. 19107
(215) 735-7200
Counsel for Respondents and Cross-Petitioners PARC et al.

Of Counsel:
ROBERT A. BURT
OWEN M. FISS
127 Wall Street
New Haven, Conn. 06520

*Attorney of Record

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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QUESTIONS PRESENTED

1. Does Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act prohibit Pennsylvania from subjecting retarded persons to the regression, isolation and custodial conditions found by the trial court to exist at Pennhurst?

2. Does 42 U. S. C. § 1983 provide a remedy to enforce Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6010 ("Section 6010")?

3. Does Pennsylvania law support the judgments of the courts below?

4. Did the trial court abuse its discretion in granting relief which would prohibit the use of Pennhurst as a residence for retarded people and require provision of treatment, services and habilitation in the community?

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS AND CROSS-PETITIONERS PARC, et al.

STATEMENT OF THE CASE

Pennhurst opened in 1908. Its founding, "on such scale as will create an institution to accommodate not less than five hundred inmates or patients, planned and located for easy and natural additions, as population demands," was commissioned by Act of May 15, 1903, 29 *Laws of Pennsylvania* 446, and its legislative charge, "to be devoted to the segregation . . . of epileptic, idiotic, imbecile, or feeble-minded persons" was set by Act of June 12, 1913, 32 *Laws of Pennsylvania* 494.

Pennhurst is located approximately thirty miles outside of Philadelphia, its large buildings set together in the middle of six hundred acres. At the time of trial Pennhurst housed 1,230 retarded people. (104a). The conditions to which the Pennhurst institution has subjected retarded people comprise the subject matter of this case.

The factual findings establish that the "abominable conditions" at Pennhurst (103a, 162a) chronically impose regression, abuse and injury upon its retarded residents, destroying skills they had previously learned and possessed at the time of their admission.[1] (20a, 58a; 105a-106a, 162a).[2]

The findings establish that these conditions of routinized, massed and impersonal treatment of retarded people existed at Pennhurst throughout its seventy years. (19a, 58a). They establish how and why Pennhurst is "one of the worst institutions of its kind in the world." (162a).

At trial and at the further hearings on remedy, state and county defendants themselves asserted, as they had for the preceding decade, that (1) Pennhurst is an impos-

1. The findings made by the district court Judge Raymond J. Broderick were upheld unanimously by the Court of Appeals *en banc*. Petitioners contest none of the findings in this Court.

2. Appendix references are to state and county petitioners Joint Appendix to the Petitions for Writ of Certiorari filed in Nos. 79-1404, 79-1408, 79-1415, paged 1a-240a, and to the Joint Appendix of all parties, to have been filed October 20, 1980, paged 241a-1166a.

sible and defeating environment for providing habilitation services to severely retarded people; (2) that real and extensive efforts to improve Pennhurst had failed to alter the conditions to which Pennhurst subjects its residents; (3) that no one at Pennhurst needs an isolated or large institution for their habilitating treatment; everyone there can be better served in family-scale residences in the general community; and (4) that their own choice of remedy for the conditions at Pennhurst and to secure habilitation for its residents was to replace the institution with proper community-based residential settings and other community services. (42a-43a, 47a-48a, 78a, 105a). Defendants had so admitted for the decade previous to trial, they had only failed to act on this admission. (46a, 78a).

This action began on May 30, 1974. Eight retarded people, residents of Pennhurst, and the Parents and Family Association of Pennhurst, an organization of 200 parents of Pennhurst residents, were the original plaintiffs, seeking injunctive relief and damages. (15a-16a). The United States, asserting its interests under four federal statutes and seeking injunctive relief, was granted leave to intervene as a party plaintiff on January 17, 1975. (16a). Four additional retarded people, residents of Pennhurst, and the Pennsylvania Association for Retarded Citizens intervened as plaintiffs on November 12, 1975, seeking only injunctive relief.[3] (16a).

By amended complaint, filed January 8, 1976, claims under the newly enacted Bill of Rights provision of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, under Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794 and under state statute were

3. The Pennsylvania Association for Retarded Citizens was founded in 1950 and at the time of trial had "chapters in fifty-seven of Pennsylvania's sixty-seven counties, its purpose being to advance the interest of retarded persons in Pennsylvania. [Its] members include parents, other relatives, guardians and next friends of persons residing at Pennhurst and those in jeopardy of residing there." (18a).

added to the original constitutional claims under the Due Process Clause, the Equal Protection Clause and the First, Eighth and Ninth Amendments. (96a). On November 26, 1976, the plaintiff class was certified.[4]

Jurisdiction arose in the district court under 28 U. S. C. § 1331 and § 1343, the action being one to redress the deprivation by state and county officials of rights secured by, inter alia, 42 U. S. C. § 1983 and § 6010 (9a, n. 2) and by the Constitution. Jurisdiction of the state law ground arose by virtue of pendent jurisdiction.

The action was heard by Judge Raymond J. Broderick during 32 trial days, from April 18, 1977 until June 13, 1977. Judge Broderick heard the testimony of eighty witnesses, half offered by plaintiffs and half by defendants,[5] and received into evidence 27 depositions of defendants and their managing agents, 108 photographs, a three-hour videotape presented by defendants, and 288 documentary exhibits.[6] On December 23, 1977, the district court denied

4. The district court's class determination was upheld unanimously by the Court of Appeals (144a), and as to it, certiorari was denied by this Court. 100 S. Ct. 2984 (1980).

5. Plaintiffs' witnesses included fourteen expert and twenty-six fact witnesses, including eleven parents of Pennhurst residents (e.g., 611a, 695a, 362a, 733a) and three retarded people, two severely retarded, who had formerly resided at Pennhurst (588a, 595a, 603a) and three experts (testifying under authority of *Nevels v. Ford Motor Co.*, 439 F. 2d 251 (5th Cir. 1971)), who had been retained by defendants to conduct a three month study of Pennhurst. (574a, 779a, 793a).

6. The courts below found that 74% of the people at Pennhurst were severely or profoundly retarded (20a, 104a), which is exactly the proportion that obtains on the average in the other public retardation institutions, Scheerenberger, *Public Residential Services for the Mentally Retarded 1976*, 12. Some Pennhurst residents also have the physical disabilities which often accompany severe retardation, namely, cerebral palsy (21.2% at Pennhurst; 19.9% nationally) and epilepsy (27.3% at Pennhurst, 29.7% nationally).

original plaintiffs' money damage claims, but otherwise entered judgment for plaintiffs.

Judge Broderick held that the conditions of Pennhurst violate the rights of retarded people under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, the Eighth Amendment proscription of Cruel and Unusual Punishment, Section 504 of the Rehabilitation Act of 1973 and under state statute. The district court made dual findings, both that no individual at Pennhurst needed to be there, each could benefit from the proper community services, and that Pennhurst itself was a pun-

6. (Cont'd)

From the beginning plaintiffs specifically focused on severely retarded people to demonstrate (1) that severely retarded people especially require structured, individual address to learn, maintain and exercise life-skills; (2) that individually structured attention is not now and never has been available or possible at Pennhurst; and, (3) that such individually structured attention is possible, likely, and in fact present in family-scale community living arrangements provided by defendants in Pennsylvania. Plaintiff PARC's Ex. 48, 1003a, presented the disability facts concerning Pennhurst residents and every witness testified in terms of the severely retarded, *e.g.*, Roos, 260a and Clements, 310a (the developmental approach); Dybwad, 545a, Girardeau, 449a (the conditions of learning); Girardeau, 455a, Glenn, 481a, Bolin, 684a (community living arrangements); Glenn, 488a, Roos, 273a (speech and communication); Clements, 329a, Lancaster-Gaye, 417a (individually adapted wheelchairs for people with severe cerebral palsy); Settle, 517a (vocational services); Hersh, 772a (effective seizure control for people with epilepsy).

The suggestion by Amici Congress of Advocates, et al. that specific problems of severely retarded people were not addressed in the trial court betrays a failure even to glance at the record of this case, let alone to read it.

Throughout this Brief, severely or profoundly retarded people including those with additional physical disabilities are referred to as "severely retarded people," for the record shows the conditions of learning are similar across this range of disability and "require similar treatment and services." See 42 U. S. C. § 6001(7) (1976).

ishing institution which could not practically be rehabilitated. In summary of its findings, the court wrote:

> On the basis of the evidence presented in these proceedings, we find that the retarded residents of Pennhurst have not received, and are not receiving, minimally adequate habilitation. Furthermore, on the basis of this record we find that minimally adequate habilitation cannot be provided in an institution such as Pennhurst. As the Court has heretofore found, Pennhurst does not provide an atmosphere conducive to normalization which is so vital to the retarded if they are to be given the opportunity to acquire, maintain and improve their life skills. Pennhurst provides confinement and isolation, the antithesis of habilitation. We found that Pennhurst has produced regression and in many instances has destroyed life skills possessed by its retarded residents at the time of their admission. (58a).

At two further hearings on remedy, state and county defendants reaffirmed their express policy that all retarded people should be removed from Pennhurst and the institution should be closed, but refused to offer to the court any remedial plan except the one offered at trial which the court found to be "vague and indefinite." (77a-78a).

Thus to remedy the harm imposed by unlawful conditions at Pennhurst, Judge Broderick concluded that "our Order must provide that immediate steps be taken to remove the retarded residents from Pennhurst." (77a). Mindful that "[g]reat caution and care must be taken to make certain that each and every retarded resident who is moved from Pennhurst can be accommodated in a community facility which will provide minimally adequate habilitation," Judge Broderick ordered state and county defendants to provide suitable community living arrangements and other community services to plaintiffs and to establish monitoring mechanisms, including individualized program plans, which would assure their quantity and

quality, and to take certain measures to minimize harm to residents during the interim operation of Pennhurst. (79a-88a). The court appointed a Master to oversee the transfer of residents and to assure the presence of safeguards in the community and in Pennhurst's interim operation. (80a-81a).

After argument and reargument *en banc* on its own motion, the Court of Appeals *en banc* unanimously concurred in the trial court's findings of fact (103a-108a, 155a-56a, 162a, 163a) and, dividing 6-3,[7] affirmed the judgment and orders of the district court in all respects but three.[8] (161a). Even the three judges in dissent would have held that "the conditions at Pennhurst revealed in this record fall below a statutory or constitutional threshold of decency so as to merit judicial intervention." (162a).

Contrasting starkly with "the abominable conditions to which Pennhurst residents have been subjected" (103a), the Court of Appeals found:

> ". . . Pennsylvania operates small and less isolated programs referred to as Community Living Arrangments (CLAs). The latter programs reflect a recognition of the principles of normalization for the habilitation of the retarded. Under normalization principles, retarded persons are treated as much as possible like nonretarded persons. The purpose of such treatment is remediation of the delayed learning process so as to develop maximum potential in self-help, language, personal, social, educational, voca-

7. Circuit Judges Gibbons, Rosenn, Weis, Garth, Higginbotham and Sloviter joined in the Court's judgment and opinion. Chief Judge Seitz, Judges Aldisert and Hunter dissented. Judge Adams did not participate.

8. One of these, an order to provide alternative employment for Pennhurst employees, was not the subject of conditional cross-petition here. The other two, an order providing for the eventual closing of Pennhurst and another prohibiting admissions to Pennhurst, were, and certiorari was granted at No. 79-1414.

tional and recreational skills. These remediation efforts, the trial court found, are, in general, much more likely to succeed in small living units which are closer to and more reflective of the normal society." (105a).

The Court *en banc* did not reach the constitutional grounds (108a, 131a) or Section 504 (141a), but rested its judgment upon Section 6010, the Bill of Rights provision of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 and upon the Pennsylvania statute.[9] The Court *en banc* held that § 6010 provides retarded people a statutory right to habilitation (109a) and, finding that "the clear preference of the Act is deinstitutionalization" (140a), "institutionalization [being] strongly disfavored" (159a), the Court held that § 6010(1), (2), and (3)(A), as well as the state statute (151a), states "a presumption in favor of placing individuals in C[ommunity] L[iving] A[rrangement]s." (159a).[10]

9. Section 6010, contrary to Petitioners' assertion (Br. 6, n. 12), was pleaded by all plaintiffs, the U. S. complaint invoking its predecessor Act, briefed in the district court on preliminary injunction, specified as at issue in the pretrial order, and, with other contemporaneous related enactments of the Congress, was briefed in opening briefs in the Court of Appeals. (9a, n. 2). As of the date of the district court opinion, this Act had been mentioned in dicta in one case, but no case resting upon the Act had been decided. Chief Judge Pettine's decision in *Naughton v. Bevilacqua*, 458 F. Supp. 610 (D. R. I. 1978), *aff'd. in part* 605 F. 2d 586 (1st Cir. 1979), was the first holding invoking § 6010.

10. Contrary to Petitioners' assertion (Br. 38, n. 59), community living arrangements were not undefined in the court record. Defendants' documents defining Pennsylvania's eight types of community living arrangements are in the record as PARC Exhibits 63 (1029a), 64 (1032a), 33 (986a). At the time of trial, 3,437 retarded Pennsylvanians, including severely retarded people, had resided in community living arrangements. PARC Ex. 64, 1032a. See testimony of state officials at 928a, 941a, 863a-864a.

The Court *en banc* held that "institutionalization . . . is not foreclosed completely by the governing federal and state statutes" (159a) and, on that ground, vacated the district court orders providing for "the eventual closing of Pennhurst" and prohibiting admissions to Pennhurst (161a). The Court "remanded for individual determinations by the court or the Special Master as to the appropriateness of an improved Pennhurst for each such person." (156a). Under both statutes, the Court held, the standard on remand is:

> "Only where . . . an improved Pennhurst is the only appropriate place for [habilitating] individual[s] should it be used. For all other[s] CLAs must be provided." (160a).[11]

The dissent "agree[d] with the majority that the legislative history indicates a preference for least restrictive treatment" (165a) and with the district court that "given proper facilities, all of these persons [the Pennhurst residents] could be served 'in the community'" (173a), but the dissent could not find in the language of § 6010 "a general right to individualized treatment in the least restrictive environment." (164a). The dissent "assum[ed]" although it did not find, that there could be "a Pennhurst without the deplorable living conditions here" (163a). The dissent conceded, "I do not know what a properly run Pennhurst would be like" (192a), but nonetheless would have ordered "improvement of Pennhurst" and "require[d] the state to eliminate the deplorable conditions at Pennhurst" (163a), apparently on the basis of a constitutional right under the Due Process Clause (191a-193a), "apply[ing] to every individual, whether inside or outside an institution" (192a)—a right to "adequate living conditions" (162a), or to "minimally adequate

11. The Court of Appeals did not direct the district court to order "improvements" beyond those the court had originally entered for the interim operation of Pennhurst. (160a).

supervision and care" (192a), or to "adequate food, shelter, medical care and other necessities" (193a).[12]

On June 9, 1980, the Court granted certiorari on petitions of state, suburban county, and Philadelphia defendants and a post-judgment intervenor and granted the conditional cross-petition of respondents PARC, et al. The Court specified an additional question: "Does 42 U. S. C. § 1983 provide a remedy to enforce the provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6000 et seq.?" 100 S. Ct. 2984 (1980).

On June 30, 1980, the Court granted a partial stay of the judgment and orders below; four Justices would have denied a stay entirely.

SUMMARY OF ARGUMENT

I. In Section 6010 Congress acted to end warehousing of severely retarded people in custodial institutions and to require developmental services. For decades public retardation institutions unsuitable for treatment, education and habilitation programs had offered only regression and abuse to severely retarded people. By Section 6010 Congress unequivocally established their "right to appropriate treatment, services, and habilitation," requiring services "designed to maximize their developmental potential" in "the setting least restrictive of . . . personal liberty." The statute bans custodial institutions; it does not categorically prohibit all large, isolated institutions, but establishes a strong presumption against them and in favor of family-scale, community-based facilities.

Section 6010 expresses the Congress' long-standing concern to ensure equal citizenship for severely disabled people and its recognition that Congressional efforts since

12. The dissent assumed (164a), but did not indicate whether it would decide, that § 6010 provides "a right to treatment" (164a) and that the state statute provides "a statutory right to some kind of treatment." (175a).

1963 to encourage the states to abandon their injurious institutions and instead develop community-based services had yielded disappointing and meager results. Congress' resolve was informed by the experience of the federal courts which, absent Congressional direction, had responded under the Constitution to halt the continuing detriment imposed by custodial institutions, by opening public education to severely retarded people and by seeking, first and unsuccessfully, to reform the character of custodial institutions like Willowbrook and then turning instead to small, community facilities.

During four legislative years, 1972-1975, Congress intensively examined the situation of severely retarded people. In a series of related enactments, Congress required the states to include severely retarded people in service programs and to act to maximize their developmental potential. In 1975 by Section 6010 Congress imposed a paramount framework upon "the Federal Government and the States both" to direct the expenditure of some $3,168 billion annually in federal contributions to retardation services.

Section 6010 embodies Congress' judgment that most large, isolated institutions are irretrievably custodial, and would have to be phased out and replaced by community services. Eschewing extensive, detailed standards, Congress declared the rights essential to effectuating its judgment and directed that "public funds" not be spent upon any custodial "institutional or residential program." Congress thus directed courts to scrutinize the institutional or residential program. The trial court was faithful to this direction and the Congressional intent, which obviates unnecessary judicial interventions into professional judgments concerning individual needs.

II. Neither the language of Section 6010 nor its extensive legislative history gives any indication that Congress intended to rely exclusively upon administrative enforcement to ensure disabled people their rights, or to

displace judicial enforcement; to the contrary. *Maine v. Thiboutot,* 100 S. Ct. 2502 (1980), settles the question whether 42 U. S. C. § 1983 provides a judicial remedy to enforce Section 6010. The personal rights and entitlements established by Section 6010 are grounded in Congress' plenary powers under the Fourteenth Amendment and the Spending Clause and their deprivation may be directly enjoined by a court of equity. Decisions of this court have not limited relief to cutting off federal funds.

III. In the first legislative response by any state to the 1963 Presidential and Congressional initiatives, Pennsylvania's 1966 Act required the state and counties to provide adequate retardation services "to every citizen in every community which are available now only to a lucky few, in the more progressive communities" (A-2), as both courts below held. As they found, there is no issue here whether respondents' rights under state law are conditioned on the availability of funds; the cost of community living arrangements and services for all Pennhurst's residents is less than the cost of Pennhurst's maintenance; $18 million in capital funds authorized by the Legislature in 1970 specifically to provide community facilities for Pennhurst residents was available but unspent; during four years before trial the four counties returned to the state, unspent, $7 million for community services.

IV. The detailed record of regression and abuse of severely retarded people in Pennhurst, of the failure of recurrent attempts to improve Pennhurst, the acknowledgement by defendants that in their judgment Pennhurst can not be fixed up and that throughout the decade before trial state policy had been to replace Pennhurst entirely with community-based facilities and services, warrant the orders of the district court entered in this case. The district court's orders carry out the Congressional mandate to phase out custodial institutions and to develop alternative community-based services.

ARGUMENT

I. Congress in Section 6010 Prohibited Custodial Institutions; the Presumption Thus Created Against Large Isolated Institutions Was Properly Applied to Require That Pennhurst Be Phased Out and Alternative Community-Based Services Be Provided.

Congress has made the dispositive decision regarding the question in this case—the propriety of custodial institutions for severely retarded people. In Section 6010, the Congress established the personal rights of severely retarded people and their entitlement to treatment, services and habilitation; by its terms, Congress acted "to change the tragic warehousing of human beings that has been the product of insensitive Federal support of facilities providing inhumane care and treatment of the mentally retarded." 121 *Cong. Rec.* 16519 (1975). Several federal statutes currently provide more than $3.168 billion annually to the states for retardation services.[13] Acting under its power to direct this spending and its power to enforce the Fourteenth Amendment, the Congress undertook to end custodial warehousing and to guarantee severely retarded people the treatment, services and habilitation which can free their very considerable capabilities for citizenship.

South Carolina v. Katzenbach, 383 U. S. 301 (1966) (the Voting Rights Act of 1965 Case), respondents submit, is the model for analysis of Section 6010. In both instances, the problem was an historic and deeply intractable one. As to both problems, Congressional enactments several times over more than a decade had yielded dis-

13. *E.g.*, the Rehabilitation Act of 1973, 29 U. S. C. § 701 *et seq.*; the Education for All Handicapped Children Act of 1975, 20 U. S. C. § 1401 *et seq.*; the Social Security Act, titles XIX and XX, 42 U. S. C. §§ 1396d(d) and 1397, as well as the program assistance provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. §§ 6000-6009, 6013, *et seq.*

appointing results. In formulating the statutory course it ultimately took, the Congress in both instances drew upon the experience of the lower courts acting under the the Constitution without benefit of any Congressional standard, adopting some of the remedial directions those courts had taken, discarding others.

In enacting the Voting Rights Act of 1965, Congress did not conclusively ban literacy tests; instead it erected a strong statutory presumption against them and required states to overcome a considerable burden of proof to sustain tests which common and persistent experience showed had been applied abusively. The Bill of Rights Act, at issue in this case, expresses the same Congressional judgment. After twelve years of effort by Congress and courts to improve shockingly abusive conditions in state institutions for mentally retarded persons, the Congress concluded that "the unsuccessful remedies . . . prescribed in the past would have to be replaced by sterner and more elaborate measures." *South Carolina v. Katzenbach, supra,* 383 U. S. at 309. Accordingly, in Section 6010 Congress mandated the end of custodial care by requiring developmental services. As with literacy tests in the Voting Rights Act, Congress did not foreclose the possibility of any institutional programs but rather required states to discharge an evidentiary burden by demonstrating in judicial proceedings that large, isolated institutions would not violate the "right of [severely retarded] persons to . . . treatment, services, and habilitation . . . designed to maximize [their] development potential . . . and provided in the setting that is least restrictive of . . . personal liberty." This judicial role is well within the competence and traditional functions of courts in applying Congressionally enacted standards, guided by expert testimony in adversary proceedings, to ensure that state agencies respect the rights of citizens.

Congress, addressing the legacy of large isolated institutions created by states in the early 20th century to segregate "epileptic, idiotic, imbecile or feeble-minded

persons,"[14] had sought in a series of enactments beginning in 1963 to encourage the displacement of such institutions by funding the development of community alternatives for severely retarded people. But incentives failed. In 1975 the Congress, therefore, required state and federal governments to fund only institutions or residential programs which are designed to maximize their potential and least restrictive of their personal liberties. In so doing—as both the majority and the dissent in the Third Circuit recognized (140a, 159a, 165a)—the Congress expressed its clear preference for community facilities, and established a strong presumption against institutions which are larger than family-scale and isolated.[15] This presumption must guide the courts and govern the actions of "the Federal Government and the States both". In applying this presumption which concerns programs, courts will not face the problems presented by the Third Circuit's individual

14. The origins of these institutions is told in P. Tyor, *Segregation or Surgery: The Mentally Retarded in America* (Northwestern University Ph.D. diss. 1972); W. Wolfensberger, "The Origin and Nature of Our Institutional Models" in *President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded* (1st ed. 1969). Compare C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford Rev. Ed. 1957). See also *The Menace of the Feebleminded in Pennsylvania* (C. H. Frazier, Chrmn, Public Charities Assn. of Pa., 1913) (pamph. col., Hist. Soc. of Pa.).

15. Social Security Act, Title XIX regulations reflect the common distinction between small family-scale institutions of 4 to 16 and large institutions of 17 or more where retarded persons are provided services in addition to room and board. 42 C. F. R. § 435.1009 (1979). Often on the record of this case and in Congressional discussion itself the word "institution" is used as E. Goffman, *Asylums* xiii (1962) defined it ("a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life") and hence simply to denote the differences between large, isolated places and small places of family-scale whose residents interact with the wider community.

person-by-person determinations and will be consistent with Congress' focus upon the elimination of outmoded custodial institutions.

The story of the evolution of Congressional policy regarding state treatment of severely retarded people is as follows.

A. Congressional Encouragement of Community-Based Services

On February 5, 1963, following the findings of his President's Panel on Mental Retardation,[16] President John Kennedy delivered a Special Message to the Congress calling its attention to the "antiquated, vastly overcrowded, chain of custodial state institutions." 1963 *Public Papers of the Presidents* 126, 128; 109 *Cong. Rec.* 1837, 1838 (1963). As to the future, the President's 1963 Message said:

> "[S]ervices to the mentally retarded must be community based. . . . We must move from the outmoded use of distant custodial institutions to the concept of community-centered agencies." *Id.* at 128, 134; 109 *Cong. Rec.* at 1838, 1841.

The Special Message called upon the Congress to legislate:

> "To retain in and return to the community . . . the mentally retarded, and there to restore and re-

16. Among the recommendations of the President's Panel had been: "Improved methods and facilities for care, with emphasis on the home and the development of a wide range of local community facilities." Report to the President, *A Proposed Program for National Action to Combat Mental Retardation* 14 (1962). The President's Panel forewarned:

> "After nearly 200 years of orientation to the concept of congregate care for the mentally retarded . . . , it is difficult to change the pattern and adopt a new frame of reference. As long as we have major financial investments in large plants, it will be a temptation to some to defend them as satisfactory or even preferable." *Id.* at 143.

vitalize their lives through better health programs and strengthened educational and rehabilitation services." *Id.* at 137; 109 *Cong. Rec.* at 1842.

Congress responded by authorizing funds for comprehensive retardation plans [17] and by enacting a new federal-state grant-in-aid program to fund community-based alternatives.[18]

In 1967, Congress expanded federal funding authority to include grants to the states for staffing and start-up expenses of community facilities.[19]

In 1970, Congress replaced these authorities with the Developmental Disabilities Services and Facilities Con-

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17. The Maternal and Child Health and Mental Retardation Planning Amendments of 1963, P. L. 88-156.

18. The Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, P. L. 88-164. Under this Act, by 1969, $137.4 million were granted to the states to build community vocational, day care, educational and residential facilities, as well as community service coordination facilities and research and university affiliated training centers—"a network of facilities where the retarded can obtain services in their own communities." Secretary's Committee on Mental Retardation, *Mental Retardation Construction Program* iii (March 1969) reprinted in *Mental Retardation and Other Developmental Disabilities, 1969,* Hearings Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare, 91st Cong., 1st Sess. 343, 409 (1969) (hereinafter "1969 S. Hearings").

The Developmentally Disabled Assistance and Bill of Rights Act of 1975, like the three intermediate Congressional enactments in 1967, 1970 and 1973, is formally a Title of this 1963 Act. See *Compilation: Rehabilitation, Comprehensive Services and Developmental Disabilities Legislation,* prepared for the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources (Comm. Print 1979).

19. The Mental Retardation Amendments of 1967, P. L. 90-170, § 4, 81 Stat. 528.

struction Amendments,[20] a broad, new federal-state grant-in-aid program intended (1) to provide funds to the states for "gap-filling" community services, because other statutes, for example, the Social Security Act and the Rehabilitation Act, by now provided the largest portion of federal funds to state retardation services; and (2) to focus the state's use of these other federal funding authorities upon supplying community alternatives to institutionalization by requiring certain state planning mechanisms. See P. L. 91-517, 84 Stat. 1316-21; § 101(b).[21]

In 1973, in order to review the effectiveness of the program, Congress extended the Developmental Disabilities Services Act for only one year. P. L. 93-45; H. R. Rep. 93-227 at 6-7; 1973 U. S. Code, Cong. & Adm. N. at 1469. In 1974 the Act was again extended for a single year.

B. Court Action Before Congressional Direction

In the early 1970's faced with the actuality of custodial institutions presented by the claims of severely retarded people sustaining regression, abuse and injury in them and lacking Congressional direction, a substantial number of lower courts relied on the Constitution to attack two aspects of state treatment of retarded people.

1. *Rights to treatment within institutions*

Wyatt v. Stickney, 344 F. Supp. 387 (M. D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt,* 503 F. 2d 1305 (5th Cir.

20. In the 1970 Act, P. L. 91-517, the Congress recognized, as its title shows, the developmental view of severely retarded people. See note 37 *infra.*

MR 68 and *MR 69,* Reports to Presidents Johnson and Nixon of the President's Committee on Mental Retardation, and Congress' Hearings and Reports preceding the 1970 Act provide a retrospective on the decade. See *MR 68: The Edge of Change* 4, 11-12; MR 69: *Toward Progress—The Story of A Decade* 26-27, 30. Both Reports are reprinted in 1969 S. Hearings at 273 and 309. See also S. Rep. 91-757 at 2-3, 9 (April 6, 1970), H. R. Rep. 91-1277 at 13-15 (July 6, 1970).

21. Substantially the same provisions are at 42 U. S. C. §§ 6063 (b)(2), 6067 (1976).

1974) was first.[22] Although *Wyatt* closed admissions to the institution and spoke of least restrictive environments, it basically sought a remedy by providing extensive, detailed standards to improve institutional conditions.[23] *New York State Association for Retarded Children v. Carey*, 393 F. Supp. 715 (E. D. N. Y. 1975) (the *Willowbrook* case) followed.[24] It embraced a different constitutional ground regarding "cruel and unusual punishment" and a right to "protection from harm" and after extensive remedial involvement, the court moved toward a different remedy from *Wyatt*. Its remedial orders directed that "[d]efendants shall take all steps necessary to develop and operate a broad range of non-institutional community facilities and programs to meet the needs of

22. The courts which examined large, isolated institutions found their central destructive effect to be the regression they imposed upon residents. *Wyatt v. Stickney*, 344 F. Supp. 387, 391 (M. D. Ala. 1972) *aff'd sub nom. Wyatt v. Aderholt*, 503 F. 2d 1305, 1309 n. 4 (5th Cir. 1974); *New York State Assn. for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715, 717, 718 (E. D. N. Y. 1975); *cf. Horacek v. Exon*, 357 F. Supp. 71, 73 (D. Neb. 1973).

23. Seven years later, still relying only upon the Constitution, the *Wyatt* court found "substantial and serious non-compliance" with its standards in the Partlow institution, though very many additional dollars were being spent and much new staff had been added. *Wyatt v. Ireland*, C. A. No. 3195-N, unreported opinion of October 25, 1979.

24. It was Senator Javits' first-hand experiences at Willowbrook which caused him to originate the Bill of Rights:

> "I personally viewed the tragedy of Willowbrook. At the request of Governor Rockefeller, I urged special Federal crisis intervention to assist the State of New York in improving the situation at Willowbrook and any other New York State institutions with similar difficulties and pledged myself to the introduction of a bill of rights for the mentally retarded. I regret that the HEW report failed to provide urgently needed Federal leadership to the Willowbrook crisis and the plight of all mentally retarded." 1973 S. Hearings, *infra* note 30, at 230.

Willowbrook's residents and of the class," requiring that within six years the Willowbrook institution be reduced to "250 or fewer" people. 393 F. Supp. at 717.[25] *Willowbrook* is the first case disfavoring institutional placement and ultimately finding that the specific challenged institution could not be made decent or workable.[26]

2. *Right to education within community*

Throughout the country state laws had excluded severely retarded people from the public schools; in direct consequence large numbers of them had been institutionalized.[27] Beginning with *Pennsylvania Association for Re-*

25. The Willowbrook court's first remedial orders were informed by the findings of a 1968 Federal Study Team on Willowbrook that "there [is] an urgent need to develop more community-based facilities as opposed to institutions." S. Rep. 94-160, *infra* note 30, at 30 (1975) (the Senate Report on the Bill of Rights).

In *Horacek v. Exon* (C. A. No. 72-L-299, D. Neb., October 31, 1975) (the *Beatrice* case), the remedy entered was similar, that Beatrice be reduced from 1,200 to 250 or fewer and its residents be provided instead community residences and other community services.

26. After early experience during implementation with transfers to other smaller but still isolated and larger than family-scale institutions, one of 75 people, the court barred such transfers, including transfers to the newly-constructed 250-bed Bronx Development Center, *NYSARC v. Carey,* C. A. No. 72-C-356, 357, E. D. N. Y., slip opinion of June 10, 1977. After successful experience with transfers to structured and supervised family-scale community living arrangements, the court required such for all Willowbrook residents and announced its intention ultimately to order community-based residences for all, *NYSARC v. Carey,* 466 F. Supp. 479, 485 (E. D. N. Y. 1978) (dictum), *aff'd* 612 F. 2d 644 (2d Cir. 1979). See testimony of the Chairman of the court-appointed Willowbrook Review Panel to the district court in this case, 358a-360a.

27. At Pennhurst, 1004a, as in public retardation institutions nationally, the average age of admission has been 14; 80% of institutional residents were admitted when 18 years old or under. Butterfield, "Some Basic Changes in Residential Facilities," in PCMR,

tarded Citizens v. Commonwealth of Pennsylvania, 343 F. Supp. 279, 294-297 (E. D. Pa. 1972) (three judge court), many courts found a constitutional right not to be excluded from public education and invalidated the state laws which had forced severely retarded children out of the community and into institutional placement.[28] *PARC* and the decisions following were predicated upon findings that all severely retarded persons are capable of benefiting in important ways from a properly structured program of education and training.[29]

C. Congress' Directive Statutes

During four legislative years, 1972-1975, Congress held extensive hearings to review the effectiveness of its 1963-1970 incentives, the operation of the wider statutory fabric of disability programs, and the various litigative efforts and court approaches intended to improve the situation of the severely retarded and other developmentally disabled

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27. (Cont'd.)

Changing Patterns in Residential Services for the Mentally Retarded 15, 22-23 (Rev. Ed. 1976). Once in, at Pennhurst as nationally, the average time residents have been there is 21 years. 20a; *id.* at 23.

28. By 1975, forty-six pending or completed court cases concerned constitutional claims of right to education for severely retarded and otherwise handicapped children. See H. Rep. 332, 94th Cong., 1st Sess. at 3-4 (1975); 121 *Cong. Rec.* 19487-19491 (1975) (summary of cases inserted by Senator Williams, Chairman of the Committee on Labor and Public Welfare).

29. The education cases in effect applied the Court's dictum in *San Antonio Independent School District v. Rodriguez,* 411 U. S. 1, 36-37 (1972) that "if a State's . . . system occasioned an absolute denial of educational opportunities to any child" or denied "an opportunity to acquire the basic minimum skills" questions of constitutionality would arise under the guarantees of expression, association and citizenship.

people.[30] To vindicate variously conceived constitutional rights, Congress reached clear conclusions, as follows:

1. *Related Enactments Based Upon the Developmental View of Severely Retarded People*

PARC was clearly endorsed in the Education for All Handicapped Children Act of 1975 and its predecessor Elementary and Secondary Education Amendments of 1974. Congress required that "the State[s] assure all handicapped children[,] regardless of the severity of their handicap[,] the right to a free appropriate public education", 20 U. S. C. § 1412(1) and (2)(C). Congress required that priority in time-phased implementation of a free appropriate public education for all be given "first to handicapped children who are not receiving an education, and second . . . to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education." 20 U. S. C. § 1412 (2)(B) and (3).[31] A program of monitoring and enforcement modelled on and enlarging upon the *PARC* example and using the common statutory form of federal-state entitlement programs was enacted; federal courts were

30. Hearings and Reports of the Congress during 1972-1974 on the Developmentally Disabled Assistance and Bill of Rights Act of 1975, the Education for All Handicapped Children Act of 1975 and its predecessor 1974 Elementary and Secondary Education Amendments, the Rehabilitation Act of 1973 and its succeeding Rehabilitation Amendments of 1974, and the White House Conference on Handicapped Individuals Act are compiled in Appendix A to this Brief. They are cited hereinafter by the abbreviated form set out in the Compilation.

31. Congress found:

"developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that given appropriate funding, state and local educational agencies can and will provide effective education and related services to meet the needs of handicapped children." P. L. 94-142, § 3(a), 89 Stat. 774, 20 U. S. C. § 1401 note.

See 20 U. S. C. §§ 1431(a)(3)(B) and 1414(a)(6).

clearly directed to ensure that this Act is complied with by the states, 20 U. S. C. § 1415(e) (1976). It was plain that Congress intended to exercise its enforcement powers under Section 5 of the Fourteenth Amendment, see e.g., H. R. Rep. 94-332 at 2-4 (1975); S. Rep. 94-168 at 6, 9 (1975); P. L. 94-142, § 3(a) 89 Stat. 774-75, 20 U. S. C. § 1401 note, and that Congress was legislating to reach and to render unnecessary the institutionalization of severely retarded persons:

> "Providing educational services will ensure against persons needlessly being forced into institutional settings. One need only look at public residential institutions to find thousands of persons whose families are no longer able to care for them and who themselves have received no educational services. Billions of dollars are spent each year to maintain persons in these subhuman conditions." S. Rep. 94-168 at 9 (1975).[32]

2. *Section 6010's Application of the Developmental View to Residential Programs*

In Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 the Congress addressed residential programs for the severely retarded:

(a) *Substantive Residential Program Standards*

Congress in Section 6010 rejected the *Wyatt* approach of extensive detailed standards focused on the goal of improving programs in large, isolated institutions. In § 6010, Congress embraced a different standard: that state residential programs "should be designed to maximize the developmental potential" of every severely retarded per-

32. As to adult severely retarded people, Congress in the Rehabilitation Act of 1973 completely revised the vocational rehabilitation program to require that vocational rehabilitation shall "serve *first* those with *the most severe handicaps.*" 29 U. S. C. §§ 701(1), 721(a)(5)(A) (emphasis supplied).

son and that this design could best be accomplished in small-scale (i.e., family-styled), community-based residences (i.e., in the language of the statute, "in the setting that is least restrictive of . . . personal liberty").[33] Throughout the Hearings, testimony upon testimony showed such a design to be practical and feasible in family-scale community residences, (e.g., 1973 S. Hearings at 246-

33. Section 6010 emerged from Conference Committee as a succinct expression of the essential elements of the Senate's 328-page bill of rights, 121 *Cong. Rec.* 16470-16514 (1975), eschewing enactment into positive statutory law of extensive detailed standards for the operation of residential and other programs in favor of setting "the direction and framework for improving the overall situation of this country's mentally retarded". 121 *Cong. Rec.* 29820 (1975) (chief sponsor); *id.* at 29818 (Chairman, Subcomm. on the Handicapped); *id.* at 29821 (Chairman, Comm. on Labor and Human Resources).

For the long-form statement of the rights encapsulated in Section 6010, see S. 462 (1975) at, *e.g.* § 221(a)(b) ("accessible to the community"), § 215(8) ("family or home-like . . . conducive to achievement by the resident"), § 249(a) ("small enough to insure . . . meaningful . . . personal relationships") and §§ 220-283 (administrative policies and practices, services, records, safety and sanitation).

The desire for simplicity in statement of the rights (121 *Cong. Rec.* 29309 (1975)), the concern expressed frequently at Hearings that lengthy detailed standards might mistakenly reinforce the maintenance of large residential institutions thus defeating the bill's central purpose (see, e.g., 1973 S. Hearings at 242-43; 245-46; 323-25 and 645, 1974 H. R. Hearings at 1052-53, 1055), and the desire to avoid a complexity which would prejudice court enforcement (H. Conf. Rep. 94-173 at 42; 1975 U. S. Code, Cong. & Adm. N. at 943, 961), contributed to the precise formulation of § 6010.

The House had relied on an earmarking provision in its program assistance bill to induce the rebudgeting of state and other federal funds currently spent on institutional care to community care instead, H. Rep. 94-58 at 10; 1975 U. S. Code, Cong. & Adm. N. at 928; 121 *Cong. Rec.* 9977 (1975). Section 6010 thus required directly of all institutions or residential programs receiving public funds what the House bill had sought to encourage.

47; 256-57; 323-25; 345; 348; 562-63; 692-93); at no point is there identified or described, as a matter of fact or theoretically, any large institution so designed or any individual whose disabilities could possibly require a large isolated institution.[34] Congress instead concluded:

> "It must be recognized that the vast majority of developmentally disabled persons and the vast majority of persons now institutionalized should not be in these institutions at all. Efforts to assure proper treatment, education, and habilitation services in large institutions should not deflect attention from the fact that *most of these institutions themselves are anachronisms, and that rapid steps should be taken to phase them out.* Many of these institutions by their very nature, their size, their isolation, their impersonality, are unsuitable for treatment, education, and habilitation programs." S. Rep. 94-160 at 32-33 (emphasis supplied).[35]

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34. Congress was explicitly attentive to the fact that phasing out offending institutions would not occur overnight and was concerned to assure some minimum attention to safety and decency, consistent with the constraints large, isolated institutions impose, for those who would for any time more be in them. *E.g.*, S. Rep. 94-160 at 32; see testimony of NARC, 1974 H. R. Hearings at 1052-53; 1974 S. Hearings at 389. Hence Section 6010(3)(B)(*i-vi*).

35. The Chairman of the Senate Labor and Public Welfare Committee, closing floor consideration of the Bill of Rights in the Senate, rendered this appraisal:

> "Over the past few years, the horrifying conditions which exist in most of the public residential institutions for the mentally retarded and other developmentally disabled persons have provided shocking testimony to the inhuman way we care for such persons. The conditions at Willowbrook, at Partlow in Alabama. and at Rosewood in Maryland, and at many other institutions have shown beyond a shadow of a doubt that the treatment of these individuals is worse than all of us would like to admit.
>
> "Steps to scale down many of these large custodial institutions have resulted in not-so-large institutions, often with not

Throughout its deliberations the Congress emphasized and re-emphasized:

> "the tragic lack of developmental services which enable most individuals with developmental disabilities to, in fact, live more normal lives." S. Rep. 94-160 at 36.

Throughout it reiterated:

> "all persons with developmental disabilities have the right to services and treatment which will promote their development and enable them to live in the community, whether or not that entails a protected environment."

By requiring "treatment, services and habilitation", the Congress thus flatly rejected custodial care.[36] Congress did not prohibit all large isolated institutions; it

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35. (Cont'd.)

much improved care and with little followup. This has been true of Willowbrook: in 1965 and again in 1972, broad criticism has been levied at this institution; all indications point toward little change, unless substantial legal advocacy pressure is forthcoming. While much can be said about the lack of available funds to improve conditions at these institutions, at some point this country must draw the line. The abuses are too commonplace to point at a single institution, or a single abuse and say that it is an anomaly." 121 *Cong. Rec.* 16516-17 (1975)."

36. Petitioners make only one argument as to the "substance of the obligations" established by Section 6010(1)(2) and (3). Br. 26. The argument isolates subsection (3) and then asserts "the section requires facilities to provide appropriate treatment *'or'* to comply with six specific criteria; hence its terms can be satisfied in *either* fashion." The juxtaposition of this argument just with the language of subsection (3) shows it to be wrong as a matter of plain meaning:

prohibited custodial institutions, and allowed the pos-

36. (Cont'd.)

Section 6010:

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to an institution or other residential program for persons with developmental disabilities that—

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of each person; or

(B) does not meet the following minimum standards: (i)-(vi).

Petitioner's reading:

The section requires facilities to provide appropriate treatment *"or"* to comply with six specific criteria; hence, its terms can be satisfied in *either* fashion.

Plainly the subsection means that public funds may *not* be provided to facilities that either do *not* provide appropriate treatment or do *not* comply with six specific criteria. To receive public funds a facility must satisfy both requirements; it must both provide appropriate treatment *and* comply with six specific crtieria.

The source of Petitioners' mistake is revealed by their adoption (Br. 26 n. 45) of a district court's holding in *Kentucky Assoc. for Retarded Citizens v. Conn,* (C. A. No. C-78-0157 LA, W. D. Ky), unreported Slip Opinion of March 21, 1980. Petitioners explain that a facility which satisfies *either* requirement may lawfully be funded by quoting that opinion as follows:

> "It would seem that Congress realized that there might even be situations where a developmentally disabled person would not have to be furnished treatment and habilitation as such, but would have to be provided with *custodial care* according to minimum standards such as proper diet, appropriate medical services, proper safety compliance, and prohibition of the use of physical restraints." (emphasis supplied)

It could not be clearer that Section 6010 was enacted by the Congress precisely to reject *custodial care,* to forbid it, and instead to require appropriate treatment, services and habilitation for every severely retarded person.

sibility that some large isolated institution might accommodate a potential-maximizing design. But Congress clearly accepted the overwhelming testimony before it, the evidence of history, the experience of retarded people, retardation professionals and organized parents, and its own observations that such institutions were most unlikely. Thus Congress adopted a strong presumption in favor of family-scale community-based residential settings and against large, isolated institutions intending that this presumption can be rebutted only by demonstrating that any given large, isolated institution is in fact maximizing developmental potential. The burden upon the State to so demonstrate is a heavy one, for the Congress had found large, isolated institutions to be commonly and persistently offensive, defeating the developmental potential of severely retarded people.[37]

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37. Plainly Congress based the Education Acts of 1974 and 1975, the Rehabilitation Act of 1973 and Section 6010 itself in the developmental view of severely retarded people and has required the states to act upon this view. The Senate Report accompanying the Bill of Rights articulates the developmental view as well as contending traditional views which the Congress rejected; in part S. Rep. 94-160 at 27-28 says:

> ". . . . Finally, there is the view that developmentally disabled individuals are 'diseased.' They are viewed as sick and in need of constant care. This leads to indefinite custodial care. This last model is gradually being replaced by a *developmental view* of mental retardation. Such a view stresses that *all developmentally disabled individuals have potential for learning and growth.*
>
> "From this developmental model, it follows that *custodial care*—which is predicated on *the assumption that certain individuals are essentially incapable of development—must be rejected.* The newer developmental model emphasizes concrete program goals for individuals and therefore encourages evaluation based on specific outcomes.

(b) *Federal Funding Governed by Section 6010*

Section 6010 makes clear that this substantive programmatic standard applies to all public funds for institutional or residential programs. Federal monies thus governed by Section 6010 include not just those under the program assistance provisions of the Developmental Disabilities Act, but the full range of funds across the entire statutory fabric of federal-state programs for retardation services: at least $3.168 billion in federal funds in fiscal year 1980. U. S. Department of Health, Education and Welfare, *Special Report: Mental Retardation* in *Hearings before the Subcommittee on Departments of Labor, HEW, and Related Agencies of the Committee on Appropriations,* 96th Cong., 2d Sess., pt. 2 at 641-44, 673.[38]

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37. (Cont'd.)

"*A final, but critically important dimension of this new model is that developmentally disabled persons should live like nondevelopmentally disabled persons to the greatest degree possible.* Every effort should be made to assist developmentally disabled persons to maximize their ability for self-care and to live normal lives. From this, it also follows that each developmentally disabled person should be allowed to live in the least restrictive environment conducive to his or her maximum development."

See also the White House Conference on Handicapped Individuals Act of 1974, 88 Stat. 1631-34 § 301(b), 29 U. S. C. § 701 note (1976).

38. The Report's "total obligations" line is arithmetically correct through page 643; the expression of education expenditures (644) as $184,000, rather than $184 million (as 673 shows them), requires a correction in the total obligation line on 644, to the textual figure.

The 1980 HEW Report shows HEW expenditures for retardation for each fiscal year since 1977. It understates HEW expenditures, for it does not report social service (title XX) or medical assistance expenditures (see page 660). It does not include expenditures by other departments, e.g. by HUD, e.g. 42 U. S. C. § 1438, by Labor, 29 U. S. C. §841 *et seq.*, or by Treasury, 31 U. S. C. § 1221 *et seq.*

The federal share under these federal-state assistance programs varies: for Vocational Rehabilitation expenditures it is 80%, 29

By far the largest amount of federal funds to state retardation services flow to adult services; in particular, the largest single portion is Title XIX (ICF/MR), which can be used to support community-based residential facilities of 4 to 16 persons. 42 U. S. C. § 1396d(d).[39] Title XIX is an entitlement program—a state must serve every eligible individual who wants the service provided under the Act and the federal government will bear a portion of the cost, in Pennsylvania 56%. 42 U. S. C. § 1396a(a)(8).[40] Every person who is a beneficiary of the rights established by Section 6010 is also eligible for Title

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38. (Cont'd.)
U. S. C. § 706(6) (Supp. 1978); Title XX social services, 75%, 42 U. S. C. § 1397a(a) (Supp. 1978); for Title XIX residential and related services, 50 to 83%, 42 U. S. C. § 1396d(b) (Supp. 1978).

39. In 1971 Congress amended the long-term care residential service provisions of Title XIX to authorize residential service funding for: "the active provision of rehabilitative, educational and training services to enhance the capacity of mentally retarded individuals to care for themselves or to engage in employment," 117 *Cong Rec.* 44720 (1971) (chief sponsor). 42 C. F. R. § 435.1009 and, e.g., § 442.481(g) (1979). See also U. S. Dept. HEW, H.C.F.A. "Interpretive Guidelines and Survey Procedures for the Application of the Standards for Institutions for Mentally Retarded Persons or Persons With Related Conditions" (September 5, 1974).

40. The entitlement terms of Title XIX are precisely the same as the terms of Title IV of the Social Security Act (A.F.D.C.), enforced by the Court against the states in, e.g. *King v. Smith*, 392 U. S. 309, 333 (1968); *Townsend v. Swank*, 404 U. S. 282, 286 (1971), and *Carleson v. Remillard*, 406 U. S. 598 (1972).

Unlike Title XIX, funds for vocational rehabilitation and education programs do have ceilings; but the Rehabilitation Act directs: "*in the event* that the vocational rehabilitation services *cannot* be provided to *all* eligible handicapped individuals . . . , selection . . . shall be determined on the basis of serving *first* those individuals with the *most severe* handicaps." 29 U. S. C. § 721(a)(5)(A) (emphasis supplied).

XIX residential services.[41] Thus a state which accords severely retarded people the residential services required by Section 6010 may obtain federal financial support for 50% to 83% of the cost.

Far from imposing an unbearable burden on the states and leaving them fundless to discharge their statutory obligations under Section 6010 (Pet. Br., *passim*), the integrated statutory scheme of which Section 6010 is the paramount provision, fairly and fully shares the cost of implementing the rights of severely retarded people, provided only the states are scrupulous in respecting their rights and focusing services to them upon community-based programs.

c. *Judicial Standards for Enforcement of Section 6010*

Congress did not mean to abandon the example of judicial action to protect the severely mentally retarded; it did not abandon *Wyatt, Willowbrook, PARC* et al. in this regard. To the contrary, Congress understood and intended that "to change the tragic warehousing . . . that has been the product of insensitive federal support of facilities providing inhumane care and treatment . . .", 121 *Cong. Rec.* 16519 (1975), would require judicial enforcement of Section 6010.[42] But by providing clear standards for the judiciary to apply, Congress remedied the problem in the earlier cases that judges were left at large to weigh conflicting opinions and contending views regarding severely retarded people and the ways and means of appropriate treatment of them. Congress has much greater competence to make such decisions than

41. "[T]he mentally retarded or persons with related conditions" are eligible for ICF/MR services. 42 U. S. C. § 1396d(d). From the beginning and now, the definition of retardation and related conditions under Title XIX (ICF/MR) has been "developmental disabilities, as defined under [the D. D. Act], as amended." 42 C. F. R. § 435.1009 (1979); 39 *Fed. Reg.* 2223 (January 17, 1974).

42. On the enforceability of § 6010 in a private right of action, see Argument II below.

courts and, regarding the severely retarded, the Congress has made those decisions.[43] With Section 6010, the courts need no longer be so troubled nor need they try each institution presented to the court by the claims of severely retarded people *ab initio* without direction from the Congress; now the judicial task is the customary one, as to which court competence is undoubted: application of the Congressionally-set standards to particular cases.

D. The Application of Section 6010 to This Case

Judge Broderick's ruling that Pennhurst must be closed appeared to the Third Circuit as an application of a *per se* rule that no institution under any imaginable program could pass muster. If Judge Broderick in fact meant to apply such a *per se* rule, he would have been misapplying Congress' intention concerning large, isolated institutions, by transforming the Congress' strong but rebuttable presumption into a conclusive one. The Third Circuit was clearly faithful to the statute when it held:

> "Of course, deinstitutionalization is the favored approach to habilitation. The federal statutory materials make that clear. . . . However, we have recognized that although institutionalization is strongly disfavored, it is not foreclosed by the governing federal and state statutes." (158a-159a).[44]

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43. By contrast Congress has not acted regarding mentally ill people with such specificity and has not, as it did in Section 6010 for retardation programs, defined the standard which must govern judicial review of state actions regarding the mentally ill. Thus the Court's caution in *Parham v. J. R.*, 442 U. S. 584 (1979) and *O'Connor v. Donaldson*, 422 U. S. 563 (1975) regarding the treatment of mental illness is justified but not applicable here.

44. Also reflecting exactly the fabric of the Congressionally set standard, the Court of Appeals wrote:

> "It is probably true, as the trial court found, that in general institutions are less effective than community living arrangements in facilitating the right to habilitation in the least restrictive setting. There is ample testimony on the record indicating

But the Third Circuit also specified that the district court should make person-by-person judgments regarding individual placement (e.g., 156a, 159a-160a). This is inconsistent with the Congress' intent that courts judge the validity of particular state residential programs, not that courts make individual placement decisions with respect to those programs. This may also not be consonant with the concern expressed by the Court in *Parham v. J. R., supra,* regarding the competence of federal judges to make individual placement decisions[45]; whereas judges are clearly competent to review state administrative and professional judgments regarding the purposes and actual effect of their residential *programs,* as in general agency reviews. *Parham* itself envisions that the programmatic adequacy of professional admissions decisions is to be judicially reviewed, to assure adequate professional "independence." 442 U. S. at 617.[46]

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44. (Cont'd.)

the shortcomings of institutions as places for habilitation. . . . Moreover, institutions would generally appear not to be the least restrictive environment in which to provide habilitation." (155a-156a).

45. But see *O'Connor v. Donaldson,* 422 U. S. 563, 574 n. 10 (1975) where Justice Stewart wrote for the Court:

> "O'Connor argues that . . . the Court must assume that Donaldson was receiving treatment sufficient to justify his confinement, because the adequacy of treatment is a 'nonjusticiable' question that must be left to the discretion of the psychiatric profession. That argument is unpersuasive. Where 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present. See *Jackson v. Indiana,* 406 U. S. 715. . . ."

46. In *Parham,* this Court ruled that states need not require state court judges to examine or override decisions by parents to place their children in psychiatric facilities when that decision was supported by the independent judgment of qualified professionals. In this case Judge Broderick was not overriding such joint decisions

It is not clear that Judge Broderick did in fact apply an impermissible *per se* rule. He had an extensive record before him about every aspect of the Pennhurst institution. He had extensive experience regarding the severely retarded, dating from his participation as a member of the *PARC* court, see p. 20 *supra*. He was very aware of his limitations as a judge regarding inappropriate interference with professional judgment. In his dissent to the district court decision in *Institutionalized Juveniles v. Sec. of Public Welfare*, 459 F. Supp. 30, 50 (1978), which was specifically cited with approval by Chief Justice Burger for the Court, reversing, in *Secretary v. Institutionalized Juveniles*, 442 U. S. 640, 645 n. 7 (1979), Judge Broderick had written: "the determination as to the kind of education, training and care which will be most beneficial to the retarded juvenile is a decision more appropriately left to the professionals outside the judicial process." What appeared to the 3d Circuit as the application of a *per se* rule, may more correctly be seen as the application of exactly the presumption Section 6010 embodies and a judgment on the extensive record before him as to Penn-

46. (Cont'd.)

by parents and independent professionals. He was instead relying on the overwhelmingly expressed judgment of professionals, including the defendants' own professional witnesses, that no child should ever be sent to this particular institution, Pennhurst. In doing so, Judge Broderick was enforcing the mandate of this Court in *Parham* to ensure retardation professionals' "independent . . . neutral and detached . . . judgments . . . in the best interest of the children", (442 U. S. at 616-17).

Judge Broderick's remedial Order here, para. 2, 80a, placed individual program plan decisions where they ordinarily belong, in the county and state process. Since on the record such decisions had not heretofore been made in accordance with professional standards, the district court ordered they be so made and for the first time required that parents or next relatives and retarded persons themselves be given a full opportunity to participate in the individual program plan process. Because of the record, the district court appointed a special Master to review the process as to professional adequacy.

hurst, that the burden of rebuttal had not been met, that this particular institution could not conceivably meet the standards mandated by Congress so that alternative family-scale, community-based residential programs have to be provided.[47]

This Court should affirm Judge Broderick's judgment concerning the failure of state officials to satisfy the Section 6010-imposed burden of proof necessary to justify Pennhurst, on the ground that this record and the clear competence and care Judge Broderick brought to his judgment met the statutory criteria. Alternatively, the Court could remand to Judge Broderick for clear statement by him regarding the standard he was applying. Either course—affirming Judge Broderick or remanding—would affirm the Third Circuit's judgment regarding the institutional program standards in Section 6010, but would modify that court's misreading, when it required individual-by-individual judicial determinations, of the intention of Congress. Congress clearly did intend that courts inquire into a residential program itself applying a presumption against large, isolated institutions. This inquiry was conducted by the district court and the Third Circuit erred in disallowing it and its remedial consequences.[48]

II. The Personal Rights and Entitlements Established by Section 6010 Are Enforceable in the Federal Courts

This Court in *Maine v. Thiboutot,* 100 S. Ct. 2502 (1980), held that 42 U. S. C. § 1983 provides a remedy to enforce, as against official deprivations, rights established by any federal statute, apparently including Section 6010. Petitioners argue the exception, that exclusive remedy for violations of Section 6010 lies with the Secretary of Health

47. This view of Judge Broderick's decision, fully supported on the record of the case and in the district court's opinion, is discussed at Argument IV below.

48. It was to support this conclusion that respondents' PARC et al. filed the conditional cross-petition in No. 79-1414.

and Human Services;[49] they argue also that judicial relief available to severely retarded people is limited to an injunction to cut off federal funds and may not encompass enjoining the official violation of federally protected statutory rights. Both arguments are contrary to the settled course of this Court's decisions.

A. Exclusive Enforcement of Section 6010 Has Not Been Granted the Secretary of HHS

Congress did not confide exclusive enforcement of Section 6010 to the Secretary of HHS, any more than it did in the statutes declaring personal rights examined in *Cannon v. University of Chicago,* 441 U. S. 677, 704-08 (Title IX); in *Regents of University of California v. Bakke,* 438 U. S. 265, 419 n. 26 (1978) (Stevens, J., for Burger, C. J., Stewart and Rehnquist, J. J., dissenting in part and concurring in part) (Title VI);[50] in *Lau v. Nichols,* 414 U. S.

49. "The only exception," Mr. Justice Powell wrote, dissenting in *Maine,* "will be in cases where the governing statute provides an exclusive remedy for violations of its terms." *Id.* at 2513, n. 11.

Mr. Justice White, in *Chapman v. Houston Welfare Rights Organization,* 441 U. S. 600, 672 (1979) (concurring), had written:

> "The substantive scope of the rights which may be protected and vindicated under § 1983 against contrary state action . . . includes not only federal constitutional rights but also all rights secured by federal statutes unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is inconsistent with congressional intentions."

50. "The notion that a private action seeking injunctive or declaratory judgment relief is inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. See *Rosado v. Wyman,* 397 U. S. 397, 420. . . ." *Bakke, supra* at 419, n. 26.

Mr. Justice Stevens for the Court in *Cannon, supra* at 690 n. 13, wrote that the Court has long "recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms."

563, 565 (1974) (Title VI); or in the federal-state grant-in-aid statutes requiring certain conduct of the states, *Rosado v. Wyman,* 397 U. S. 397 (1970) and its progeny.

In *Rosado v. Wyman,* 397 U. S. 397, 420 (1970), Mr. Justice Harlan had written for the Court:

> "We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for non-compliance. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." [51]

Not only is the "clear indication in [the] statute that its remedial provisions are exclusive" *Chapman v. Houston Welfare Rights Organization,* 441 U. S. at 672, entirely absent in the Bill of Rights Act but there is not a hint anywhere in the extensive legislative history of Sec-

51. *Rosado* noted as to public assistance recipients:

"Petitioners do not seek review of an administrative order, nor could they have obtained an administrative ruling since HEW has no procedures whereby welfare recipients may trigger and participate in the Department's review of a welfare program." 397 U. S. at 406.

The same is true here. Section 45 C. F. R. § 1386.94(b)(1) which Petitioners urge "allows for meaningful participation by concerned individuals" in administrative terminations of funding (Br. 31-32) has, in exactly the same form, since 1971, governed compliance hearings under Title IV of the Social Security Act (A. F. D. C.), see 45 C. F. R. § 213.15 (1979), and under Titles XIX and XX, see 45 C. F. R. §§ 201.6, 228.19 (1979). Presence of this provision has never justified curtailment of access to judicial relief. Under it, as under the equivalent provision at the time of *Rosado,* 45 C. F. R. § 201.5(d) (1970), respondents cannot trigger any administrative proceedings and have no more opportunity to participate in Secretarially initiated hearings.

tion 6010 that the long involvement of federal courts in protecting the rights of disabled persons was to be suddenly abandoned at this juncture. To the contrary, the legislative history is replete with Congressional recognition of the vital role of court enforcement. The Conference Report on the Bill of Rights says:

> " These rights . . . should be *protected* and *assured by* the Congress and *the courts.*" H. R. Conf. Rep. 94-473 at 42; [1975] U. S. Code Cong. & Adm. N. 943, 961. (emphasis supplied).[52]

Upon floor consideration, the Chairman of the Senate Labor and Public Welfare Committee had said: "all indications point toward little change unless substantial legal and advocacy pressure is forthcoming." 121 *Cong. Rec.* 16516-17 (1975).

An intention to depart from a pre-existing pattern of court enforcement for an exclusively administrative scheme could be expected to appear somewhere in the record; it does not. It is unlikely that Congress would have relied exclusively upon secretarial enforcement after the Secretary of HEW gave express warning that HEW would not be able effectively to enforce a Bill of Rights. See letter of the Secretary of HEW to Senator Javits, December 11, 1974, in 1975 H. R. Hearings at 167. It is unlikely that a Congress which legislated "to change . . . the insensitive federal support . . . [of warehousing]," 121 *Cong. Rec.* 16519 (1975), intended to confide exclusive enforcement to the Secretary. It is unlikely that a Congress which required each state to establish an independent protection and advocacy system with authority to pursue *legal* remedies, 42 U. S. C. § 6012, intended to confide exclusive enforcement to the Secretary.

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52. That "these rights . . . should be protected and assured by the *Congress* . . ." is plainly a reference to the Congress' exercise of its Section 5 powers to enforce the Fourteenth Amendment. Nor does anything in the legislative history suggest, as Petitioners do (Br. 33 n. 52), that court enforcement was to be limited to "other statutes".

B. Relief for Violations of Section 6010 Is Not Limited to Enjoining Federal Funding

Petitioners argue the sole judicial remedy to enforce Section 6010 is an injunction to terminate federal funding and that any relief to enjoin compliance with the personal rights and entitlements granted by Section 6010 offends interests of federalism and of equity.

Section 6010 is grounded in two plenary Congressional powers, the power to ensure that federal funds are spent as it intends and the power to enforce the rights secured under the Fourteenth Amendment. The Court has held in several decisions that statutes well based in those powers raise no questions of federalism. As to Section 5, *Fitzpatrick v. Bitzer,* 427 U. S. 445 (1976); *cf. Milliken v. Bradley,* 433 U. S. 267, 291 (1977). As to the spending power, *North Carolina ex rel. Morrow v. Califano,* 435 U. S. 962 (1978); *Helvering v. Davis,* 301 U. S. 619 (1937).

Section 6010 is well based in both powers. Throughout its deliberations on Section 6010 the Congress specifically articulated its intention to enforce the Equal Protection Clause. *E.g.,* S. Rep. 94-160 at 32 (1975); 121 *Cong. Rec.* 16519 (chief sponsor), 16515 (Chairman, Subcomm. on the Handicapped), 16516 (ranking minority member, Subcomm.). In Section 6010, the Congress acted to remedy the "life segregation," S. Rep. 94-160 at 27, to which state institutions have subjected severely retarded people, to eliminate historic and deeply intractable barriers to their equal citizenship, and to supply some of its necessary conditions.

Whether Congress' enactment is viewed as overcoming state-imposed segregation of retarded people, *Meyer v. Nebraska,* 262 U. S. 390, 401-02 (1923),[53] or state-imposed

53. There the Court reviewed ancient advice:

"For the Welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That . . . the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' "

but itself concluded:

conditions which deny the opportunity to learn basic minimum skills, *San Antonio Independent School District v. Rodriguez,* 411 U. S. 1, 36-37 (1972),[54] or as enforcing the right to personal security, *Ingraham v. Wright,* 430 U. S. 651, 673 (1977),[55] or the right to a commitment whose nature and duration bear some reasonable relationship to its purpose, *Jackson v. Indiana,* 406 U. S. 715, 738 (1972) or the right of non-dangerous individuals to live safely in freedom with the help of family and friends, *O'Connor v. Donaldson,* 422 U. S. 567, 576 (1975), Section 6010 was a proper exercise of the Congress' power under Section 5 of the Fourteenth Amendment to "impos[e] on the States a remedy for the denial of equal protection that elaborated upon the direct command of the Constitution." *Oregon v. Mitchell,* 400 U. S. 112, 296 (1970) (Stewart, J., concurring); *Katzenbach v. Morgan,* 384 U. S. 641 (1966).

Section 6010 also imposes a paramount framework to direct the use of several substantial federal funding programs for retardation services. See, e.g., Section 204 of the Bill of Rights, P. L. 94-103, 42 U. S. C. § 6010 note. The Court has long held that statutes directed to both federal and state governments to bring order into federal assistance programs do not offend concepts of federalism:

> "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by

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53. (Cont'd.)

". . . their ideas touching the relationship between individual and state were wholly different from those upon which our institutions rest; [no] Legislature could impose such restrictions upon the people of a State without doing violence to both the letter and spirit of the Constitution."

54. See the discussion of the *PARC* cases at pp. 19-20 *supra.*

55. Where Mr. Justice Powell for the Court also observed: "The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects prisoners." 430 U. S. at 670.

> Congress, not the states." *Helvering v. Davis,* 301 U. S. 619, 645 (1937) (Cardozo, J.).

See also this Court's decision last Term in *North Carolina ex rel. Morrow v. Califano,* 435 U. S. 962, 98 S. Ct. 1597 (1978) (mem.), *summarily affirming* 445 F. Supp. 532 (E. D. N. C. 1977) (three judge court).[56]

Here, federal contributions to retardation services are so large (more than $3.168 billion in fiscal 1980, see p. 28 *supra*), the requirements of Section 6010 are so closely pertinent to the activities supported by the several federal funding programs for retardation services, and the enactment of Section 6010 was occasioned by such an extremely serious and pervasive national problem touching each of the federally funded programs that there can be no question but that Section 6010 is a proper exercise of Congress' spending power.

As to equitable considerations, certainly a court *may* enjoin the use of federal funds unless a state complies with statutory requirements,[57] but it is not the only permissible

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56. The Court there upheld the National Health Planning and Resources Development Act of 1972, 42 U. S. C. § 300k *et seq.*, as a proper and binding exercise of Congress' spending power, notwithstanding it requires as a condition of federal funds conduct of state officials which violates the North Carolina constitution.

The National Health Planning Act upheld in that case as addressing a matter of vital national interest—hospital cost containment—tracks Section 1122 of the Social Security Act, 42 U. S. C. § 1320a-1, an earlier and continuing hospital construction review provision. Section 1122 requires the states to apply the criteria set forth in the Mental Retardation Facilities and Construction Act of 1963, thus bringing to bear the requirements of Section 6010, for as note 18 *supra* shows, the Bill of Rights Act is a title of that 1963 Act.

57. Almost without question such an injunction would be an effective remedy to change official state and county behavior in this case since Pennsylvania, in fiscal year 1976, e.g., received $7.9 million in federal funds for Pennhurst itself (title XIX), $13.8 million for social services by the counties (title XX), as well as $661,705 in DD Act funds; altogether Pennsylvania's state-county retardation system

remedy. Given a violation of personal rights established by a federal statute, a court applying equitable considerations in adopting a feasible and effective remedy may also choose instead to enjoin future violations of the statute in order to end the violation and directly to achieve the statutory purpose, rather than cut off federal funds. See *Regents of University of California v. Bakke,* 438 U. S. at 419 n. 26; *Cannon v. University of Chicago,* 441 U. S. at 704-708. Fund cut-off is a severe and disruptive remedy of "last resort," *Cannon, supra* at 705 n. 38, which may not serve the interests of the benefited class or the statutory purpose of effectuating their personal rights.[58]

Rosado v. Wyman, supra, is not, as the Court recognized in *Cannon* and *Bakke, supra,* to the contrary. In *Rosado,* the Court did not say that federal fund-cut-off and declaratory relief is the "only" judicial relief to which plaintiffs were entitled. (Pet. Br. at 35) Nor is it correct (Pet. Br. 36, n. 56) that "the Court has not deviated" from the supposed "*Rosado* approach in subsequent cases." Where the only matter at issue is enforcement of a requirement of federal-state grant-in-aid program, the Court has not barred injunctions to end the violation itself.[59] Moreover, when personal rights are at issue, as

57. (Cont'd.)

received some $94 million in federal funds in 1976. PARC Ex. 65, 1039a-40a, 1044a. The federal contribution to retardation services in Pennsylvania is very much larger for fiscal 1980. See *Pa. Governor's Executive Budget* 1979-1980 at 634.

58. In this case where the cost of complying with the requirements of Section 6010 by supplying communtiy residences and other services for each person was found to be less than the offending institutional program, 44a, and where the state has expressed no wish to give up massive annual federal funds for its retardation service programs, the lower courts acted within the bounds of sound equitable discretion in directly enjoining the offensive official conduct and requiring complying conduct.

59. In *Carleson v. Remillard,* 406 U. S. 598, 600 (1972), where a district court had enjoined the state from continuing to use an

here, the Court has consistently treated as proper an injunction directly requiring complying conduct even though there exists the alternative to enjoin the flow of federal funds to the offending institution. *Cannon* supra; *Bakke* supra; *Lau,* supra.

III. Both Courts Below Correctly Held That the State Statute Supports the Judgment in This Case

Pennsylvania's Act of October 20, 1966 was the first legislative response by any state to the 1963 Presidential and Congressional initiative. The Act expressly provides:

> "The department shall have the power and its duty shall be: (1) to assure within the State the availability and equitable provision of adequate . . . mental retardation services for all persons who need them . . ." Pa. Stat. Annot. Tit. 50, § 4201 (225a-226a). See also § 4301 (227a-228a).

As both lower courts held and the structure of the statute, its language and its legislative history show [60], this state

59. (Con'td.)

attribution-of-income regulation which violated the AFDC provision of the Social Security Act, this Court unanimously affirmed without any question the form of the relief below. In *Townsend v. Swank,* 404 U. S. 282, 284 n. 2 (1971), where public assistance recipients sought an injunction against termination of their benefits and the district court denied any relief, the Court unanimously reversed on the merits with no instruction barring relief in the form requested. On remand, the district court directly enjoined state officials from enforcing the offending state law and to furnish benefits to those eligible as a result of the Court's decision, see *Townsend v. Edelman,* 518 F. 2d 116, 119 (7th Cir. 1975). See also *Hagans v. Lavine,* 415 U. S. 528, 533 n. 4, 539 n. 6 (1974) and the three cases cited and apparently approved there, in each of which the offending state conduct was directly enjoined; and see *Carter v. Stanton,* 405 U. S. 669, 670 (1972), *on remand,* 355 F. Supp. 1337, 1338 (S. D. Ind. 1972).

60. The legislative history of the 1966 Act, made entirely by the Act's chief sponsors, is set forth in Appendix A to the blue Brief in Opposition of PARC et al. to the Petitions for Certiorari herein.

statute was enacted exactly to require the provision of adequate community retardation services, including community-based residential services [61] in every community in the state.[62]

An unbroken line of state court decisions has so construed the Pennsylvania statute and has applied it to require the development and provision of residential and related services in the community (see the blue Brief in Opposition of PARC et al. 20-22). Since that briefing the Pennsylvania Supreme Court has given additional confirmation to the reading of *Hoolick v. Retreat State Hospital* by the lower courts (69a-70a, 125a), and in the Brief in Opposition 22, n. 20. In *Bell v. Thornburgh,* (Nos. 80-2-283 and 296, September 22, 1980), that Court dissolved a lower state court order prohibiting transfers from a State Mental Hospital to alternative facilities and held:

> "Common understanding recognizes that particular facilities are not immune from deterioration and that they therefore will, at some point, outlive their usefulness. When that point is reached, it is reasonable for a patient to expect to receive adequate treatment somewhere—it is unreasonable to expect to receive it at that particular facility." Slip Op. at J-292-16

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60. (Cont'd.)

See 1 Pa. C. S. A. 1921(7); *cf. Hellertown Manufacturing Company v. Pennsylvania,* 480 Pa. 358, 365, 390 A. 2d 732, 735 (Pa. S. Ct. 1978).

61. The 1966 Act defined "aftercare", one of nine services mandated in every county, § 4301(6), 228a, to include "foster home placement, home visiting, . . . halfway houses." See also Pa. Act 256 (1970), 235a-236a.

62. The 1966 Act's requirements of "equitable provision", far from conditioning rights upon funding (Pet. Br. 41), is to "make those services available to every citizen in every community which are now available only to a lucky few, in the more progressive communities." Sen. Pechan, A2.

Petitioners argue (Br. 41) that § 4509(5) of the Act, 229a, suspends their § 4201 and § 4301 duties. As the Court of Appeals held (125a-128a), § 4509(5) in no event relieves *state* officials of their duty. Furthermore, the district court found (43a-44a), that since 1970 and still, $18 million in unspent capital funds have been available to the five county Petitioners here for community facilities for Pennhurst residents. Thus, the statutory condition precedent to any § 4509(5) suspension of the five counties' duties never arose, nor did any county seek § 4509(5) relief (916a).[63]

The state law decision by the courts below supports the judgment in this case in its entirety (151a, 157a-161a, 175a) and should not be disturbed here.

IV. The Remedy Ordered by the District Court Was Well Within Its Equitable Discretion and Was Compelled by the Evidence, by the Position Taken by Defendants and by Section 6010.

The record in this case, including the position taken by defendants, made the district court's choice of remedy inescapable:

> "[O]ur Order must provide that immediate steps be taken to remove the retarded residents from Pennhurst. Great caution and care must be exercised, however, to make certain that each and every retarded resident who is moved from Pennhurst be accommodated in a community facility which will provide minimally adequate habilitation." (77a).

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63. The record shows that in every year from fiscal 1972 through 1975, the five counties returned community services operating funds to the state unspent, some $7 million altogether. PARC Ex. 58, 1020a-22a.

Furthermore, the courts below found, 44a-45, 105a, 160a n. 39, the cost of proper community services per person is less than costs at Pennhurst. Petitioners' unused option of transferring Pennhurst dollars to the community with the residents accounts for the Court of Appeals statement at 127a, mistaken at Pet. Br. 41. See Brief of Amici National Association for Retarded Citizens, et al., pp. 19-23.

Pennhurst, on the trial record of its seventy years and its continuing, current destructive reality, is clearly one of those "custodial" "anachronisms" identified by the Congress as "unsuitable for treatment, education and habilitation programs," "by [its] nature, [its] size, [its] isolation, [its] impersonality," S. Rep. 94-160 at 32-33. It exemplifies the "historic evil of national proportions," *Albemarle Paper Co. v. Moody,* 422 U. S. 405, 416 (1975), against which the Congress directed Section 6010. As to the particular institution Pennhurst, therefore, Section 6010 requires "rapid steps . . . to phase [it] out" and instead "the development of community alternatives." The district court's remedial conclusions by no means arose from the inexorability of any *per se* rule; its examination of remedy was structured precisely as the Congressionally intended presumption would have required and the remedy itself was clearly formed by the imperatives of the factual record before the court.

Furthermore, as the following also shows, even were respondents PARC et al. incorrect in the analysis of Section 6010 presented at Argument I above, on the record of this case the character and direction of the remedy chosen by the district court was correct. Given "the practicalities of the situation," *Davis v. Board of School Commissioners of Mobile County,* 402 U. S. 33, 37 (1971), disclosed by this record, seeking to improve Pennhurst by fixing it up would have been neither feasible nor practicable; such a remedy could not conceivably have "promise[d] realistically to work." *Green v. County School Board of New Kent County,* 391 U. S. 430, 439 (1968); *Milliken v. Bradley,* 433 U. S. 267, 280 n. 15 (1977).

As to remedy, the record before the district court showed:[64]

A. that the responsible state officials had concluded that Pennhurst is "a total loss to the Commonwealth as a mental retardation service facility," that "all of its

64. The citations which follow are illustrative, not exhaustive. The Exhibits cited were each admitted into evidence at Trial Transcript of April, 1977, pp. 1-47 to 1-64.

buildings . . . are totally unsuitable for modern mental retardation purposes" and that it is more cost-effective, as well as more effective for habilitation, to provide family-scale residential facilities and other programs in the community than to renovate or rebuild Pennhurst. See, *e.g.*, 1969-70 Pa. State Plan for Construction of Facilities for the Mentally Retarded, PARC Ex. 21, 946a; April 7, 1972 Letter of Pa. Commissioner of Retardation to Deputy Secretary Secretary, Pa. D. P. W., PARC Ex. 25, 958a-965a; 1972 Capital Renovation and Construction Investment Plan, *id.*, 966a-970a; *1975 Report of Pa. Governor's Management Review Panel* 39, 55, PARC Ex. 28, 975a, 979a; Trial testimony of Hersh, 768a-77a, Walker, 779a, and Thurman, 793a, three retardation experts who in 1977 conducted a three month study of Pennhurst for Pa. D. P. W.

B. that numerous efforts to improve Pennhurst over many decades had failed. For example, the newest institutional building built at Pennhurst at a cost of over $6 million was entirely unsuited to modern habilitation programs. Letter of Pa. Commissioner, *supra,* 958a-960a; Testimony of Pennhurst Superintendent Youngberg, 840a; Dybwad, 542a; Pennhurst Chief Psychologist Hirst, 580a.

On other failed efforts to improve Pennhurst, see, e.g., Pennhurst Assoc. Superintendent Smilovitz, *A History of Pennhurst, 1908-1926, Compiled from Superintendents' Documents* (1974) PARC Ex. 38, 988a-995a; Pa. D. P. W., *Annual Reports,* PARC Ex. 41; Dybwad, 562a-565a; Schmidt, 804a-812a; Brown, 679a-682a.

C. that expenditures at Pennhurst had already reached $60 per resident per day, 44a ($22,000 per resident per year in fiscal year 1976 dollars; $27 million total for fiscal 1976), placing Pennhurst in the highest 5% in per resident expenditures among public retardation institutions in the United States,[65] and that proper community residential and other services can be provided for every Pennhurst resident at less cost. See April

7, 1972 Letter of Pa. Retardation Commissioner, *supra; 1975 Report of Pa. Governor's Management Review Panel, supra;* Regional Commissioner Rice, 891a; Testimony of plaintiff's economist Conley, 710a-723a, and *compare* PARC Ex. 65, 1044a, *with* Montgomery County Community Cost Estimate for 121 Pennhurst Residents, PARC Ex. 33, 938a-984a.

D. that the numbers of direct care staff at Pennhurst met statutory and regulatory standards, and that staff were dedicated and sincere for the most part, but still Pennhurst residents were continually "subjected to abominable conditions" which routinely imposed regression, injury and abuse upon them. That direct care and professional staff shortages were constant at Pennhurst from its beginning and persisted throughout despite major recruiting efforts and higher salaries because Pennhurst is remote from population centers where such retardation professionals are gathered and because of Pennhurst's chronically dreary and unproductive working conditions. Testimony of Clements, 315a, Roos, 286a; Lancaster-Gaye, 417a; Smilovitz, *A Brief History of Pennhurst, supra;* Testimony of Pennhurst Superintendent Youngberg, 833a; Testimony of Dybwad, 549a-551a; Testimony of Conley, 708a-709a.[66]

E. that at the Willowbrook institution in New York City, two years after judgment and after the population of Willowbrook had been reduced by half, the number of staff doubled, and per person annual expenditures increased five-fold, to $26,300 annually and then sevenfold to $35,000 annually,[67] still the Chairman of the

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65. R. C. Scheerenberger, *Public Residential Services for the Mentally Retarded* 36, Table XXXIII (National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, 1976). See also E. Butterfield, "Some Basic Changes in Residential Facilities" in *President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded* 15, 32-33 (2d ed. 1976).

66. Compare, e.g., 1973 S. Hearings at 243.

court-appointed Willowbrook Review Panel testified to this district court: "There was no way we have been able to make Willowbrook a good place to live." Clements, 358a.

F. that every retardation professional who serves for Pennhurst as a "neutral fact finder", whose "independent judgment" the Court held in *Parham v. J. R.*, 442 U. S. 584, 606-07, 614-17 and *Secretary v. Institutionalized Juveniles*, 442 U. S. 640, 647-50 (1979) to be required by due process before a child may be constitutionally institutionalized, testified to the district court in this case that no one at Pennhurst needed to be in the institution, that each would benefit more from proper community services. See Testimony of Pennhurst Superintendent Youngberg, 829a; Pennhurst Social Services Department, U. S. Ex. 5, 1153a; two successive Regional Commissioners of Retardation, Walker, 792a, and Rice, 862a; Pennsylvania D. P. W. Director of Community Living Arrangements Knowlton, 928a, 941a.

G. that three experienced retardation professionals who had studied Pennhurst and its people intensively for three months in 1977 under contract to state defendants (1) found Pennhurst entirely unfunctional for effective retardation services and unable to be altered in any practical way to be functional; (2) and unanimously recommended in a 365 page report to defendants and in testimony to the district court that Pennhurst should be entirely replaced by community living arrangements and each of its residents transferred to such facilities, 768a-777a, 779a, 793a.

H. that after judgment below at the hearings on remedy state defendants themselves affirmatively spoke again what had been throughout trial, and for the decade before, their position on remedy for Pennhurst: that Pennhurst should be entirely replaced with community

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67. Note, Implementing Institutional Reforms," 91 Harv. L. Rev. 428, 434 n. 31 (1977).

living arrangements and every Pennhurst resident transferred to community facilities and programs. (23a, 47a-48a, 77a-78a).

These are among the unchallenged and indisputable facts which framed the remedial inquiry and the conclusion summarized by Judge Broderick in his finding:

> "On the basis of the evidence presented in these proceedings, we find that the retarded residents of Pennhurst have not received, and are not receiving, minimally adequate habilitation. Furthermore, on the basis of this record we find that minimally adequate habilitation cannot be provided in an institution such as Pennhurst. As the Court has heretofore found, Pennhurst does not provide an atmosphere conducive to normalization which is so vital to the retarded if they are to be given the opportunity to acquire, maintain and improve their life skills. Pennhurst provides confinement and isolation, the antithesis of habilitation. We found that Pennhurst has produced regression and in many instances has destroyed life skills possessed by its retarded residents at the time of their admission." (58a)

Even if every other record consideration which contributed to the district court's determination that the remedy it entered was the only practicable and effective remedy available to it were to be disregarded, the consistent expressions of defendants that *their* choice of remedy—if there has to be any remedy at all—was to replace Pennhurst with community services may have required the district court to enter the remedy it did. State and county defendants' complaint to this Court is not about the character of the remedy but that any remedy at all was ordered.

The character and direction of the remedy entered by the district court was affirmed by the Court of Appeals. (156a, 160a). The differences between the two courts touch only the question whether the primary focus for judicial inquiry under the statute should be individual determina-

tions or the propriety of a particular long-standing institutional program. For the reasons set forth above at Argument I, respondents PARC et al. believe Section 6010 and considerations of the judicial role require the latter focus. The remedial consequence of this view, should it be adopted by the Court, would be to reinstate the district court's order requiring that immediate steps be taken to remove retarded people from Pennhurst to proper community-based facilities and services and to disallow further admissions to Pennhurst.

CONCLUSION

For the foregoing reasons, Respondents Pennsylvania Association for Retarded Citizens, Jo Suzanne Moskowitz, Robert Hight, David Preusch and Charles DiNolfi, for themselves and the class they represent, respectfully request that the judgment and orders of the district court be approved, the judgment of the Court of Appeals for the Third Circuit be modified in the particulars specified above and affirmed *pro tanto*.

Respectfully submitted,

THOMAS K. GILHOOL †
FRANK J. LASKI
BEVERLY J. LUCAS
MICHAEL CHURCHILL
Public Interest Law Center of Philadelphia
1315 Walnut Street, Suite 1600
Philadelphia, Pennsylvania 19107
215/735-7200
*Counsel for Respondents and Cross-Petitioners PARC et al.**

Of Counsel:
ROBERT A. BURT
OWEN M. FISS
127 Wall Street
New Haven, Conn. 06520

October 20, 1980

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† Attorney of Record.

* Counsel acknowledge the assistance of Alan M. Sandals, a graduate of the University of Pennsylvania Law School whose admission to the Bar of the District of Columbia is pending and of Eleanor S. Elkin and Nancy J. Zollers, non-lawyers.

APPENDIX A

Compilation of Congressional Hearings and Reports, 1972-1975

On the Developmentally Disabled Assistance and Bill of Rights Act of 1975, see during the 93d Cong., 1st Sess. (1973): *Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973,* Hearings on S. 427 and S. 458 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare [cited as "1973 S. Hearings"]; during the 93d Cong., 2d Sess. (1974): *Developmentally Disabled Assistance and Bill of Rights Act, 1974,* Hearings on S. 3378 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare [cited as "1974 S. Hearings"]; *Health Services and Health Revenue Sharing,* Hearings on H. R. 11511, 11518, 11845 and 12892 Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce, Part 2 [cited as "1974 H. R. Hearings"]; S. Rep. 93-1169; H. R. Rep. 93-1127; during the 94th Cong., 1st Sess. (1975): *Developmentally Disabled Assistance and Bill of Rights Act, 1975,* Hearings on S. 462 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare [cited as "1975 S. Hearings"]; *Health Services Programs,* Hearings on H. R. 2954 Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce [cited as "1975 H. R. Hearings"]; S. Rep. 94-160, see especially the parts at 26-39, "Forces Behind Institutionalization and Deinstitutionalization" and "Bill of Rights for the Mentally Retarded and Other Individuals with Developmental Disabilities" which accompany Title II, the Bill of Rights; H. R. Rep. 94-58; H. Conf. Rep. 94-473.

On the Education for All Handicapped Children Act of 1975 and its predecessor Elementary and Secondary Education Amendments of 1974, see during the 93d Cong., 1st Sess. (1973): *Education of the Handicapped Act Amendments,* Hearings Before the Select Subcomm. on Education of the House Comm. On Education and Labor; *Education for the Handicapped, 1973,* Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare; during the 93d Cong., 2d Sess. (1974): *Financial Assistance for Improved Educational Services for Handicapped Children,* Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor; *Education for All Handicapped Children, 1973-74,* Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, Parts 1-4; H. R. Rep. 93-805; S. Rep. 93-763; H. Conf. Rep. 93-1211; during the 94th Cong., 1st Sess. (1975): *Education for all Handicapped Children, 1975,* Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare; H. R. Rep. 94-332; S. Rep. 94-168; H. Conf. Rep. 94-664; S. Conf. Rep. 94-455.

On the Rehabilitation Act of 1973 and the succeeding Rehabilitation Amendments of 1974, see during the 92d Cong., 2d Sess. (1972): *Vocational Rehabilitation Services for the Handicapped,* Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor; *Rehabilitation Act of 1972,* Parts 1 & 2, Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare; H. R. Rep. 92-928; S. Rep. 92-1135; H. Conf. Rep. 92-1581; during the 93d Cong., 1st Sess. (1973): *Vocational Rehabilitation Services,* Parts 1 & 2, Oversight Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor; *Rehabilitation Act, 1973,* Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare; H. R. Rep. 93-244; S. Rep. 93-318; H. Conf. Rep. 93-500; during the 93d Cong., 2d Sess. (1974): *Rehabilitation Act Amendments of 1974,* Hearings Before the Sub-

comm. on the Handicapped of the Senate Comm. on Labor and Public Welfare; H. Rep. 93-1048; S. Rep. 93-1139; H. Conf. Rep. 93-1457.

On the White House Conference on Handicapped Individuals Act, see S. Rep. 92-1080, 92d Cong., 2d Sess. (1972); S. Rep. 93-319, 93d Cong., 1st Sess. (1973); S. Rep. 93-1139, 93d Cong., 2d Sess. 31-40 (1974).